United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-7284-7297

United States Court of Appeals
FOR THE SECOND CIRCUIT

B P/S

NAVIEROS OCEANIKOS, S. A., owner of the Liberian Vessel TRADE DARING,

Plaintiff-Appellant-Appellee,

against

S. T. MOBIL TRADER, her engines, boilers, etc., MOBIL OIL CORPORATION, the owner of the MOBIL TRADER, and MOBIL SALES & SUPPLY CORPORATION,

Defendants and Third-Party Plaintiffs-Appellees-Appellants,

against

TRADE & TRANSPORT, INC.,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

PETITION FOR REHEARING IN BANC ON BEHALF OF DEFENDANTS AND THIRD-PARTY PLAINTIFFS MOBIL OIL CORPORATION AND MOBIL SALES & SUPPLY CORPORATION

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PETITION FOR REHEARING IN BANC ON BEHALF OF DEFENDANTS AND THIRD-PARTY PLAINTIFFS MOBIL OIL CORPORATION AND MOBIL SALES & SUPPLY CORPORATION

Defendants and third-party plaintiffs, Mobil Oil Corporation and Mobil Sales and Supply Corporation, respectfully request a rehearing, with a suggestion for rehearing in banc, and reconsideration of this Court's majority opinion, rendered on April 20, 1977, on the grounds that the majority of the panel erred by construing the terms and conditions of an indemnity agreement entered into by and between Mobil Sales and Supply Corporation and Trade and Transport Inc. to be limited to "only overflow of oil into a harbor in violation of public law or regulations, such as water purity standards, or the fouling of equipment on other vessels in the area of the bunkering operation".

Under the terms of the indemnity agreement, Trade and Transport warranted

> ". . . that each vessel [bunkered by Mobil] will be properly equipped, maintained, and operated so as to avoid leakage, spillage, overflow or water or land pollution and shall hold Seller [Mobil Sales] and its supplier [Mobil] harmless and indemnify Seller and its supplier against any claim, action, suit, assessment, fine, levy, penalty or exaction of a like nature instituted by any person (including public authorities) resulting from any such alleged leakage, spillage, overflow or water or land pollution asserted or assessed against Seller or its supplier on the ground of damages alleged to have resulted from any such alleged leakage, spillage, overflow, or water or land pollution, except insofar as it shall be established that such damage resulted exclusively from negligence of Seller or its supplier." (brackets ours)

POINT I

Judges Mishler and Van Graafeiland erred in suggesting that one who sustains damage as a result of pollution must prove that the pollutor intentionally discharged the pollutant in order to effect a recovery.

The majority opinion states:

> "While the indemnity provision refers to 'any claim', the claim must have resulted from specified occurrences: 'leakage, spillage, overflow, or water or land pollution.' In view of the obvious emphasis on discharges into the water, and the specific, parenthetical reference to 'public authorities', the word 'overflow' can reasonably be interpreted to contemplate only overflow of oil into a harbor in violation of public law or regulations, such as water purity standards, or the fouling of equipment on other vessels in the area of the bunkering operation. *The phrase 'leakage, spillage, overflow, or water or land pollution', is not rendered redundant by this interpretation. The first three words appear to refer to inadvertent spillage, while the references to 'pollution' connote intentional discharges.*"

Owners of tank vessels and tank farms will be delighted to know that they now may argue that they should be exonerated from claims for spillage, leakage or overflows of a pollutant unless they intentionally discharged such commodity into our waterways. The Admiralty and Shipping Section of the Department of Justice, the agency delegated with the responsibility of effecting recoveries for the United States for cleanup costs under the Water Quality Improvement Act, 33 U.S.C. 1160 etc., will be chagrined to learn that it cannot effect a recovery from those who pollute our waterways unless they establish that

the leakage, spillage or overflow of the contaminating commodity was intentional.

According to the majority opinion, "overflow" means "inadvertent spillage" and "pollution" connotes "intentional discharges". Since pollution cannot exist without spillage, how can an intentional discharge be caused by an inadvertent spillage?

The interpretation placed upon the indemnity agreement in the majority opinion errs in that if the words "or water or land pollution" are limited to "connote intentional discharges" then the insertion of the clause in the indemnity agreement is meaningless. Mobil does not need indemnification for an intentional act committed by the agents, servants or employees of the bunkered vessels.

Further, the majority opinion failed to take into consideration the conjunction "or" separating the phrase "leakage, spillage, overflow" from the phrase "water or land pollution". The conjunction "or" unqualifiedly contemplates two possible kinds of injury, i.e., injury to property including the bunkered vessel or environmental damage, whether occurring on land or water. The bunkered vessel can never be an exception to being damaged by a leak, spill or overflow because the vessel is, of necessity, the very first object that comes in contact with a leak or a spill or an overflow of fuel oil.

We submit that Judge Mansfield was correct when he stated in his dissenting opinion:

> "Nevertheless the majority, in my view without rationale basis, describes the indemnity as 'ambiguous' and then proceeds to emasculate it by employment of methods of construction and interpretation which appear to me to be wholly unjustified and unsupportable."

POINT II

Prior to this decision there was harmony between the decisions of the federal courts in this circuit and the courts of New York State on the interpretation of indemnity agreements. This decision changes harmony to discord.

The majority opinion cites *Capozziello* v. *Brasileiro,* with approval, 443 F.2d 1155 (2 Cir. 1971). In the *Capozziello* case, this Court found that the federal maritime law adheres to the general rule, which was the New York rule, i.e.

> "that where, as here, the indemnitee is *solely at fault* for the injuries, the indemnity clause 'will not be construed to indemnify a person against his own negligence unless such intention is expressed in unequivocal terms * * *'." (emphasis added)

citing as authority *Rice* v. *Pennsylvania,* 202 F. 2d 861, 862 (2 Cir. 1953) and two New York Court of Appeals cases, i.e. *Kurek* v. *Port Chester Housing Authority,* 18 N.Y.2d 450, 276 N.Y.S.2d 612, 223 N.E.2d 25 (1966) and *Thompson-Starrett Co., Inc.* v. *Otis Elevator Co.,* 271 N.Y. 36, 2 N.E.2d 35 (1936).

Rice v. *Pennsylvania R. Co., supra,* decided in 1953, a federal maritime case, also relied on the rationale of *Thompson-Starrett* v. *Otis Elevator Co., supra.*

When *Capozziello* v. *Brasileiro* was decided, the rationale of *Thompson-Starrett* was no longer the law in New York. It was changed by *Levine* v. *Shell Oil Company,* 28 N.Y.2d 205, 321 N.Y.S.2d 81, 269 N.E.2d 799 (1971) which was decided on April 8, 1971. It appears this decision was not brought to the attention of the Court when *Capozziello* v. *Brasileiro* was argued 12 days later, on April 20, 1971, or when *Capozziello* v. *Brasileiro* was decided on May 24, 1971.

The Court in *Levine* v. *Shell Oil Company* said at page 212:

> "Inasmuch as *Kurek* and *Liff* have made substantial inroads on the Thompson-Starrett rationale, it is no longer a viable statement of the law. As we said in *Kurek*, (18 N.Y.2d, *supra*, at p. 456): 'courts should be wary of construing these provisions in such a manner that they become absolutely meaningless.'"

In *Levine* v. *Shell Oil Company*, even though the contractual indemnity provision fell short of expressly stating that its coverage extended to the active negligence of the indemnitee, the Court found that that must have been the intent of the parties. The Court reasoned:

> "Since the plain meaning of these words fairly includes the liability for the active negligence of Shell, we see no reason why more should be required to establish the unmistakable intent of the parties. A contrary construction would result in the conclusion that the clause was a nullity. Surely, this could not have been the intent of the parties (see *Corhill Corp.* v. *S.D. Plants, Inc.*, 9 N.Y.2d 595, 599; *Muzak Corp.* v. *Hotel Taft Corp.*, 1 N.Y.2d 42, 46)." (pp. 212, 213)

The New York Court of Appeals had abandoned its ancient enmity toward such indemnity agreements, deciding henceforth that such agreements would be given a *normal, common sense reading*. 1971 Syracuse Law Review, pp. 288-289.

Judge Mansfield in his dissenting opinion in the instant case said:

> "In plain and unequivocal language the buyer's agent, Trade & Transport, Inc. ('Transport') warranted to the seller, Mobil Sales, that each vessel for which Transport purchased marine fuel oil (including plaintiff's Daring) would be 'properly equipped, main-

> tained and operated' so as to avoid 'overflow' and agreed to hold Mobil Sales harmless against 'any claims' for damages resulting from 'any such . . . overflow' except to the extent that the damage 'resulted exclusively from negligence of seller [Mobil Sales and Mobil Oil Corp.]'."

Furthermore, the interpretation of the language of the indemnity clause accorded by the Court in *Capozziello* v. *Brasileiro*, was different than the interpretation accorded to the indemnity clause in the instant case, hence resulting in non-uniformity of decisions in this Court.

In *Capozziello* v. *Brasileiro*, the indemnity clause referred only to "damage to persons or property". Yet the Court concluded, that in a *stevedoring operation* which involves the ship, her equipment and her cargo, such language *"would include damage to the ship, her equipment and cargo"* (at p. 1159).

But the interpretation accorded to the indemnity provision in the instant case falls far short of *Levine* rationale or the interpretation accorded in *Capozziello* v. *Brasileiro*, since the majority of the panel refused to recognize that in a *bunkering operation*, whenever leaks, spills or overflows occur, the property most likely to be damaged would be the ship being bunkered.*

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* "And there comes a point where this Court should not be ignorant as judges of what we know as men." *Watts* v. *Indiana*, 338 U.S. 49, 52 (1949).

POINT III

The majority opinion misapprehended the scope of the indemnity provision in *Capozziello* v. *Brasileiro*.

Capozziello v. *Brasileiro* enunciated a rule, adhered to by both New York and federal maritime law, which applied to an indemnitee that was *solely* at fault. The indemnity clause, in the instant case, provided that if the indemnitees (Mobil-Mobil Sales) were *exclusively* at fault then there would be no indemnification. Ergo, even if the federal maritime rule is the old *Thompson-Starrett* doctrine, it should only apply to an indemnitee which was *solely* at fault and not to Mobil and Mobil Sales who were only *partly* at fault. A common sense approach, as enunciated in *Levine* v. *Shell Oil Company*, and echoed by Judge Mansfield's dissent herein should be the federal maritime rule governing this case. Judge Mansfield said that the intent of the parties was clear, with the purpose of the indemnity being to avoid disputes over allocations of fault between the parties whenever overflows occur in a bunkering operation.

It is submitted that this Court should contemporize the federal maritime law and apply the rationale of *Levine* v. *Shell Oil Company*, which would be in harmony with the dissenting opinion herein, i.e. that the provision was unambiguous and that damage to the bunkered vessel was contemplated by the parties.

CONCLUSION

It is respectfully submitted that this petition for rehearing, with a suggestion for rehearing in banc, should be granted and that, on rehearing this Court should change its decision to agree with the dissenting opinion filed by Judge Mansfield.

Respectfully submitted,

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Attorneys for Defendants and Third-Party Plaintiffs-Appellees-Appellants Mobil Oil Corporation and Mobil Sales & Supply Corporation

DONALD M. WAESCHE, JR.
LOUIS G. JULIANO
Of Counsel

Due and timely service of TWO copies
of the within PETITION is hereby
admitted this 13TH day of MAY 1977

Judith Pergamen
....
Attorneys for PLAINTIFF - APPELLANT - APPELLEE

Poles, Tubbs, Palestrand
v
Sheats ?
3pm